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19-P-1018

Appeals Court

COMMONWEALTH vs. JENNIFER GARVEY.

No. 19-P-1018.

Suffolk. November 3, 2020. - February 2, 2021.

Present: Green, C.J., Desmond, & Lemire, JJ.

Massachusetts Bay Transportation Authority, Police officers.  
Police Officer. Assault and Battery. Practice, Criminal,  
False report, Presumptions and burden of proof, Required  
finding. Evidence, Cross-examination, Bias. Witness,  
Cross-examination, Bias.

Indictments found and returned in the Superior Court  
Department on December 17, 2015.

The case was heard by Douglas H. Wilkins, J.

Liam Scully for the defendant.  
Kathryn Sherman, Assistant District Attorney, for the  
Commonwealth.

DESMOND, J. In March 2014, the defendant, Jennifer Garvey,  
was a police officer working for the Massachusetts Bay  
Transportation Authority (MBTA) Transit Police Department. As a  
result of her conduct as a police officer, she was charged with

assault and battery by means of a dangerous weapon, assault and battery, civil rights violation with injury, and two counts of filing a false report by a public employee in the course of her official duties. Following a jury-waived trial, the defendant was convicted of two counts of assault and battery, and two counts of filing a false police report. She now appeals, arguing that (1) she was impermissibly precluded from cross-examining a witness for the prosecution, (2) the trial judge improperly instructed himself on the burden of proof concerning the police privilege, and (3) there was insufficient evidence to show that the force she used was unreasonable and unnecessary and that she knowingly filed a false police report. We affirm.

Background. Because the defendant challenges the sufficiency of the evidence, we summarize the evidence in the light most favorable to the Commonwealth, reserving certain details for discussion. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

On March 26, 2014, the defendant was working as a police officer for the MBTA Transit Police Department and was assigned to a fixed post at the Dudley Station bus terminal.<sup>1</sup> At approximately 1:50 P.M., a bus inspector for the MBTA requested the defendant's assistance with a passenger who appeared to be

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<sup>1</sup> Dudley Station is now known as Nubian Station.

intoxicated and was causing a disturbance on a bus. The defendant escorted the passenger, who was later identified as fifty-four year old Dolores Williams, off the bus and directed her to a nearby bench. The defendant called for the assistance of additional officers, and Officers Alfred Trinh and Sean Curry responded to Dudley Station. Officer Trinh observed Williams to be visibly intoxicated, but he testified that she was not a threat to officer safety.

Mary Holmes, the victim in this case, was walking towards her bus at Dudley Station on this date when she observed the defendant leaning over a bench and yelling at Williams. Holmes was familiar with Williams from her own daily commute. Although Holmes initially continued toward her bus, when she heard Williams calling for help, Holmes returned to the bench area to attempt to calm Williams. Holmes testified that Williams appeared to be under the influence of alcohol and was not cooperating with the defendant. When Williams attempted to leave the bench area, the defendant shoved her back down onto the bench. Holmes testified that Williams then reached for a bottle of vodka from her bag, and pressed it to her lips. The defendant slapped the bottle from Williams's hands in an aggressive manner, picked Williams up by her coat, and with the assistance of Office Trinh, placed Williams in handcuffs.

Holmes, believing that the defendant's actions were inappropriate, decided to call 911 to report the defendant and asked the defendant for her badge number. The defendant responded, "It's 6-7-7, no[w] get the fuck out of my way before I arrest you for impeding on an ongoing investigation." Holmes testified that she shifted to the side but did not completely move away from the bench area.

The following events, which are primarily the subject of this appeal, were recorded by four MBTA public safety cameras located throughout the bus station. The four video recordings, as well as the brief audio recording from the 911 call, were admitted in evidence at trial. When Holmes called 911 and connected with a dispatcher, the defendant began pushing her backwards. A third-party witness testified that she heard the defendant threaten to spray Holmes with pepper spray if she did not back up. While Holmes was walking backwards, the defendant continued pushing her with one hand. At this point, the defendant pointed her oleoresin capsicum spray (OC spray or pepper spray) at Holmes's eyes, and deployed the spray twice. Holmes could be heard on the 911 call stating, "I'm getting Maced." A struggle then ensued between Holmes, the defendant, and Officer Trinh. The defendant used her baton to hit Holmes in the shins several times; Officer Trinh and the defendant attempted to bring Holmes to the ground; and Officer Trinh

ultimately wrapped his leg around Holmes's leg to force her to fall to the ground. During this struggle, Holmes's arms were flailing and hit the defendant and Officer Trinh.

After the struggle, Holmes was handcuffed and placed in an MBTA police car. The heat in the vehicle activated the effects of the OC spray, burning Holmes's face, ears, and eyes. Holmes was taken to the MBTA police headquarters and was booked. After booking, Holmes was brought to Boston Medical Center for treatment of the injuries to her legs and wrists.<sup>2</sup> Once Holmes was treated, she was brought back to the police station and held there overnight until her arraignment the following morning.

That same day, the defendant authored an arrest report and an MBTA police affidavit outlining the events at Dudley Station, which then served as the bases of the application for the criminal complaint against Holmes. Holmes was formally charged with assault and battery on a police officer, resisting arrest, and disorderly conduct. Her criminal defense attorney subsequently spoke to the prosecutor assigned to Holmes's case, and requested that the prosecutor watch the video recordings from the MBTA bus station cameras. The prosecutor reviewed the video recordings and came to the conclusion that they

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<sup>2</sup> Holmes's right leg required stitches as a result of the baton strikes to her shin.

contradicted what was presented in the police report. As a result of these video recordings coming to light, the case against Holmes was not proessed. Holmes and a third-party witness both filed civilian complaints with the MBTA Transit Police Department regarding the defendant's actions. The defendant's employment was terminated, and criminal charges were filed against her.

Discussion. 1. Cross-examination. We first address the defendant's argument that she was impermissibly precluded from cross-examining Officer Trinh on the issue of his potential bias. "Cross-examination of a prosecution witness to show the witness's bias or prejudice is a matter of right under the Sixth Amendment to the Constitution of the United States and art. 12 of the Declaration of Rights of the Commonwealth," Commonwealth v. Avalos, 454 Mass. 1, 6-7 (2009), quoting Commonwealth v. Allison, 434 Mass. 670, 681 (2001), and where there is a possibility of bias, "the judge has no discretion to bar all inquiry into the subject" (citation omitted). Avalos, supra at 7. Nevertheless, "[a] judge does have discretion to limit cross-examination concerning possible bias when further questioning would be redundant," or "where there has been such 'extensive inquiry' that the bias issue 'has been sufficiently aired'" (citation omitted). Id., quoting Commonwealth v. LaVelle, 414 Mass. 146, 154 (1993).

The defendant contends that the judge improperly restricted her ability to cross-examine Officer Trinh about his possible bias when the judge sustained objections to two questions posed to Officer Trinh: (1) "Were you fearful that you would be indicted?" and (2) "Why did you feel you had to have a lawyer at the grand jury?" These questions came after Officer Trinh had already testified on cross-examination about his level of involvement with Holmes and the defendant, and his potential liability for that involvement. Officer Trinh testified that he was not indicted. He testified that he was, however sued civilly by Holmes, along with the defendant and the MBTA, and that the lawsuit had ended in a settlement. Additionally, the fact that he testified before the grand jury and was represented by counsel for that testimony already had been brought out on cross-examination. Officer Trinh testified that he contacted his union to obtain a private attorney because he thought that he should be represented by counsel when he testified in front of the grand jury.

It was not an abuse of the judge's discretion to sustain the Commonwealth's objections to these two questions. There had already been an extensive inquiry concerning Officer Trinh's potential bias such that the issue was "sufficiently aired." Avalos, 454 Mass. at 7. The questions asked by the defendant related to Officer Trinh's feelings, and when the judge

sustained the Commonwealth's objections, he did not restrict the defendant from asking similar questions and did not direct the defendant to move on from that line of questioning. We see no error.

2. Burden of proof. The defendant next claims that the judge did not properly instruct himself on the Commonwealth's burden of proving that the defendant used an unreasonable and unnecessary amount of force against the victim. At trial, the defendant argued that her use of force was justified by the police privilege, which permits police officers to use reasonable and necessary force when carrying out their official duties. See Commonwealth v. Asher, 471 Mass. 580, 588 (2015). The Commonwealth bears the burden of proving that the defendant acted without justification, and accordingly, was required to prove beyond a reasonable doubt that the defendant's use of force was not justified by this privilege. See Commonwealth v. Cabral, 443 Mass. 171, 179 n.17 (2005).

We presume that in jury-waived trials, judges will "have correctly instructed [themselves] as to the manner in which evidence was to be considered in [their] role as factfinder." Commonwealth v. Batista, 53 Mass. App. Ct. 642, 648 (2002). This presumption, however, will not be applied in cases "where the record indicates otherwise." Commonwealth v. Urkiel, 63 Mass. App. Ct. 445, 451 (2005). The defendant contends that the

record here indicates that the judge failed to recognize which party bore the burden of proof. We disagree.

Both the defendant and the prosecution submitted proposed instructions to the judge. While the defendant contends that neither submission addressed the burden of proof concerning the police privilege, this contention is plainly contradicted by the record. The prosecution's submission contained the statements:

"[T]he Commonwealth must prove beyond a reasonable doubt that the battery was committed without justification. An example of justification is a police officer's use of a reasonable amount of force to make a valid arrest. A police officer making a valid arrest may use the force reasonably necessary to overcome physical resistance from the person being arrested."

In addition, the defense counsel's proposed instruction on police privilege stated, "The Commonwealth must prove beyond a reasonable doubt that the police officer did not use excessive or unnecessary force in making the arrest."<sup>3</sup> While this instruction incorrectly states the level and type of force that

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<sup>3</sup> This instruction is based on the District Court's model jury instruction on police privilege and resisting arrest, which is reserved for instances where the defendant is a civilian and is charged with resisting arrest. See Instruction 9.260 of the Criminal Model Jury Instructions for Use in the District Court (2009), at 12-13. This instruction "primarily serves to articulate that a civilian who is being arrested by someone the civilian knows is a police officer must submit to the arrest and may not use force against the arresting officer unless the officer uses excessive or unnecessary force to make the arrest." Asher, 471 Mass. at 587. This case, similar to Asher, presents the "opposite scenario," which makes such an instruction inappropriate. Id.

the Commonwealth was required to prove in this case, it properly placed the burden of proof on the Commonwealth. The discrepancies between the Commonwealth's and the defendant's proposed instructions were brought up and discussed with the judge during the charge conference. The judge assured both the prosecutor and defense counsel that he would look at each proposed instruction and their differences, and apply the law as set forth in Asher, 471 Mass. at 588.<sup>4</sup>

In fact, the record indicates that the judge was acutely aware of the Commonwealth's burden. During the charge conference, the judge recognized that the Commonwealth omitted from its proposed instructions the requirement that it prove a lack of excuse beyond a reasonable doubt on the charge of assault and battery.<sup>5</sup> The Commonwealth reasoned that the omission was due to an absence of factual basis, and the judge instructed the Commonwealth, "[Y]ou still have to prove excuse

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<sup>4</sup> Although the Asher case does not explicitly state that the Commonwealth bears the burden of proving that the defendant's actions were not justified by the police privilege, it discussed the applicability of the police privilege to the defendant's claim of self-defense. See Asher, 471 Mass. at 589. It is a well-established principle that the Commonwealth bears the burden of disproving self-defense. See Commonwealth v. Rodriguez, 370 Mass. 684, 688 (1976).

<sup>5</sup> The Commonwealth's proposed instruction listed each element of assault and battery, including "that [the assault and battery] was committed without justification or excuse," but the Commonwealth crossed out the words "or excuse."

beyond a reasonable doubt,"<sup>6</sup> further demonstrating his understanding that the Commonwealth bears the burden of proving each element of the crime charged. See Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 194 (2008) (element of assault and battery is that it occurred "without justification or excuse").

We see no indication in the record that the judge did not properly instruct himself on the Commonwealth's burden. Concluding that the judge properly placed the burden of proof on the Commonwealth to show that the force used by the defendant was unreasonable and unnecessary, we turn next to the defendant's claim that the evidence presented by the Commonwealth was insufficient to satisfy this burden.

3. Sufficiency of the evidence. "In determining the validity of a claim challenging the sufficiency of the Commonwealth's evidence at trial, we review the evidence in the light most favorable to the Commonwealth to determine whether 'any rational trier of fact could have found the essential

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<sup>6</sup> The judge's statement was specifically referencing the fact that "or excuse" was crossed out by the Commonwealth on the proposed instruction submitted. While it may appear that the judge was suggesting that the prosecutor must prove the presence of excuse, taken in context, it is clear that the judge was merely emphasizing that, despite the Commonwealth's attempt to omit the word "excuse" from the instruction, the burden remained on the Commonwealth to prove a lack of excuse. This is evident from the judge's follow-up statement, "I mean, the circumstances still have to show there's no excuse. So I'm not going to delete that from my thinking."

elements of the crime beyond a reasonable doubt.'" Commonwealth v. Powell, 459 Mass. 572, 578-579 (2011), cert. denied, 565 U.S. 1262 (2012), quoting Latimore, 378 Mass. at 677. In doing so, we follow the rule that inferences drawn by the fact finder need not be "necessary or inescapable," but instead need only be "reasonable and possible." Commonwealth v. Casale, 381 Mass. 167, 173 (1980).

a. Assault and battery convictions. To support a conviction of intentional assault and battery, the Commonwealth must prove that the defendant committed an "intentional and unjustified use of force upon the person of another, however slight." Commonwealth v. Porro, 458 Mass. 526, 529 (2010), quoting Commonwealth v. McCan, 277 Mass. 199, 203 (1931). The defendant principally argues that there was insufficient evidence to support her assault and battery convictions because no rational trier of fact could have found beyond a reasonable doubt that her use of force was not justified, i.e., reasonable and necessary.

"Because of the nature of the job, a police officer is permitted to use force in carrying out his [her] official duties if such force is necessary and reasonable." Asher, 471 Mass. at 588-589, quoting Instruction 9.260 of the Criminal Model Jury Instructions for Use in the District Court (2009), at 12. The question whether an officer's use of force is reasonable or

necessary is one to be decided by the fact finder considering all of the surrounding circumstances. See Commonwealth v. Moreira, 388 Mass. 596, 602 (1983). We conclude that there was ample evidence for the judge to find that the defendant's use of force was not reasonable or necessary with respect to each assault and battery conviction.

The defendant's first assault and battery conviction stemmed from her use of the OC spray directed at Holmes. There was substantial evidence presented by the Commonwealth to show that the defendant's use of the OC spray was not reasonable or necessary for her to carry out her official duties. Officer Trinh testified that Holmes had not interfered with the defendant's, or any of the other officers', ability to access Williams, who was the primary focus of the officers' initial attentions, and that Holmes did not initiate physical contact with the defendant at all prior to being sprayed. Officer Curry testified that, prior to being sprayed, Holmes was not acting in a disorderly manner, was not using abusive language, and did not interfere with the officers' ability to work with Williams. Most notably, Officer Curry testified that, pursuant to the MBTA use of force policy, OC spray was only to be used by an officer when a person was engaging in active resistance, rather than passive resistance. Officer Curry, who was present during the event and subsequently watched the video recordings, testified

that at no point was Holmes engaging in active resistance sufficient to warrant the deployment of OC spray.<sup>7</sup>

Furthermore, Holmes testified herself that she had not bumped the defendant or interfered with the officers prior to being sprayed. She testified that she was calling 911, felt the defendant pushing her back, and despite the fact that Holmes began walking backward on her own, the defendant pepper sprayed her twice in the eyes. Finally, a third-party witness who was present at the scene, Vanessa Ford, testified that Holmes did not hit, bump, or threaten the defendant prior to being pepper sprayed twice in the eyes. The judge not only heard all of this testimony, but he also watched the video recordings of the interaction, which provided four different viewpoints of the event, and heard the audio recording of the 911 call.<sup>8</sup> All of

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<sup>7</sup> While the defendant's expert witness, a retired New Jersey State Police trooper, testified that the defendant's use of the OC spray was objectively reasonable, the judge was free to reject this testimony. See Ulin v. Polansky, 83 Mass. App. Ct. 303, 307-308 (2013).

<sup>8</sup> One of the exhibits at trial was the audio recording overlaying the video recordings. Holmes can be seen on the video recordings holding the cell phone to her ear, and at the same time, the viewer can audibly hear the conversation she was having with the 911 dispatcher. The 911 call occurred while the defendant was instructing Holmes to back up. Holmes can be heard on the recording saying to the defendant, "I can respect your space, get your hands off of me," "Can you get your hands off of me," and "You are pushing me and telling me to back up." During her testimony, Holmes confirmed that she made these statements to the defendant.

this evidence, and the rational inferences drawn therefrom, viewed in light most favorable to the Commonwealth was more than sufficient for the judge to reasonably find that the defendant's use of the OC spray was unreasonable and unnecessary under the circumstances.

The defendant's second conviction of assault and battery, the lesser included offense of assault and battery by means of a dangerous weapon, arose from her use of the baton against Holmes. The defendant argues that there was insufficient evidence for the judge to find that her use of the baton was unreasonable and unnecessary because she used the baton only after Holmes put up a struggle when the defendant and Officer Trinh tried to arrest her. She points to the Transit Police Department's use of force policy which permits the use force when a person engages in resistance or aggression. However, the policy also states that the use of force must be reasonable under the circumstances and must be dependent on the amount of resistance received by the officer. Officer Trinh, who also participated in the struggle with Holmes, explicitly testified that in his experience the use of the baton was not necessary in these circumstances. The judge was free to reject the defendant's testimony, and accept Officer Trinh's, when making his ultimate determination that the defendant's use of force was

an unnecessary and unreasonable response to the struggle put up by Holmes.

Certainly, a person being arrested may not resist that arrest with force, even if the arrest is unlawful, when no excessive or unnecessary force has been used against that person. Moreira, 388 Mass. at 601-602. However, where an officer does in fact use unreasonable or excessive force, a person is privileged to use such force as reasonably appears to be necessary. Id. See Commonwealth v. Graham, 62 Mass. App. Ct. 642, 653 (2004) (where there is use of excessive or unnecessary force by police, there is concomitant right of self-defense).

First, the Commonwealth presented sufficient evidence that Holmes was not aware that she was being arrested prior to being sprayed with the OC spray, nor would a reasonable person be in her circumstances. For a person to be resisting arrest, it must be objectively reasonable to that person that he or she is under arrest. See Commonwealth v. Soun, 82 Mass. App. Ct. 32, 36 (2012) (test is whether reasonable person would understand that they were being arrested). Not only was Holmes not instructed that she was being arrested or handcuffed, and not asked to place her hands behind her back, she had not committed a crime before being sprayed with the OC spray to put her on notice that an arrest would be forthcoming. Rather, the defendant told

Holmes that if she did not back up, she would be sprayed or arrested. Holmes complied with this order, and stood where other bystanders were permitted to stand, but was pepper sprayed nonetheless.<sup>9</sup>

Second, even if Holmes was aware that she was being arrested, because the defendant had unreasonably and unnecessarily deployed the OC spray, Holmes was privileged in defending herself with reasonable force. There was sufficient evidence to show that Holmes's use of force, the flailing and swinging of her arms, was in fact a reasonable reaction to being pepper sprayed. Once Holmes was sprayed in the eyes, the defendant and Officer Trinh immediately grabbed each side of her body. Officer Trinh testified that Holmes began to swing her arms, and ended up striking the officers, although he described the strike he received as "insignificant." Holmes testified that she was swinging her arms to maintain her balance and remain steady on her feet while the officers were pulling her to the ground.<sup>10</sup> She testified that she never intentionally hit one of the officers. The judge, as fact finder, was not required to

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<sup>9</sup> Holmes could not have been charged with resisting the arrest of another, see Soun, 82 Mass. App. Ct. at 34, because as testified to by the defendant, Williams was not under arrest.

<sup>10</sup> Holmes testified that she did not feel that she would be safe on the ground after observing the defendant's conduct with respect to Williams and herself.

credit testimony by the defendant or her expert that Holmes escalated the level of force by punching and kicking the defendant, especially where both Officers Trinh and Curry testified to the contrary.<sup>11</sup> Viewing this testimony in light most favorable to the Commonwealth, a rational judge could conclude that Holmes's reaction was reasonable in these circumstances, and was thus privileged by self-defense.

It then follows that the judge could rationally conclude that the defendant's use of the baton was an unreasonable response to the reasonable force employed by Holmes. At trial, the judge had the benefit of watching several video recordings of the encounter between the defendant and Holmes, including the defendant's use of the baton and the events leading up to the several baton strikes. Officer Curry testified that he did not observe Holmes do anything, other than struggle with the officers, that would have necessitated the use of the baton. And again, Officer Trinh testified that he did not deem the use of the baton necessary during that struggle. Where the defendant initiated the encounter with Holmes by using unreasonable and unnecessary force, and Holmes responded to this

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<sup>11</sup> The defendant and the defendant's expert were the only people who testified that Holmes punched and kicked the defendant. Officer Curry testified that Holmes had not punched the defendant or Officer Trinh, and Officer Trinh testified that Holmes had never raised her closed fists at the defendant and had not charged at her at any time.

unjustified force with reasonable force, a rational judge could certainly conclude that the defendant's subsequent use of force -- several baton strikes -- was unreasonable and unnecessary, and therefore not justified by the police privilege.

b. Filing a false report by a public employee. The defendant additionally argues that the evidence was insufficient to convict her of filing a false report by a public employee. "To support a false police report conviction, the evidence must establish that the defendant, acting as a police officer in the course of [her] official duties, filed a false written report 'knowing the same to be false in a material matter.'" Commonwealth v. Cohen (No.1), 456 Mass. 94, 125 (2010), quoting G. L. c. 268, § 6A. The defendant contends that the material aspects of her police report were accurate, and therefore, no rational trier of fact could find that she knowingly filed a report that was false in a material matter. We disagree.

In her report, the defendant stated that Holmes attempted to wedge herself between the officers and Williams, that she physically "bumped" the defendant several times, and that she was hindering the officers' ability to assist Williams. These statements were controverted by the video recordings of the event, as well as the testimony at trial. Both Officer Curry and Officer Trinh testified that Holmes did not interfere with the defendant's or the other officers' ability to assist

Williams, and that Holmes did not physically bump the defendant at any time prior to the defendant's use of the OC spray. The defendant's statements were certainly material because they directly affected whether the defendant was justified in her use of the OC spray. See Cohen (No. 1), 456 Mass. at 126 (statement is material where it "affected any inquiry into whether the defendant acted permissibly and reasonably"). We are thus convinced that the evidence was sufficient for a rational fact finder to conclude that the defendant knowingly filed a report that was false in a material matter.

Conclusion. In sum, because the defendant's ability to cross-examine a witness for the prosecution was not impermissibly limited, the judge properly instructed himself on the Commonwealth's burden of proof on police privilege, the evidence was sufficient to meet this burden and convict the defendant of assault and battery, and the evidence was further sufficient to convict the defendant of filing a false report, we affirm the judgments.

So ordered.